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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 CECIL L. MORTON,

12 Petitioner,

13 v.

14 MARGARET GILBERT,

15 Respondent.

CASE NO. 17-cv-5536 RJB DWC

ORDER ADOPTING REPORT AND
RECOMMENDATION

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17 This matter comes before the Court on the Report and Recommendation of U.S.
18 Magistrate Judge David W. Christel. Dkt. 16. The Court has reviewed the Report and
19 Recommendation, objections, and is fully advised.

20 Petitioner files this petition, challenging his 1994 rape, robbery and burglary convictions.
21 Dkt. 1. Respondent has filed a motion to dismiss the petition. Dkt. 8. The Report and
22 Recommendation recommends that the motion to dismiss be granted and the petition be
23 dismissed as untimely. Dkt. 16. It also recommends denial of a certificate of appealability. *Id.*
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1 The facts are in the Report and Recommendation (Dkt. 16, at 1-3), and are adopted here.
2 Petitioner filed objections to the Report and Recommendation. Dkt. 17. Petitioner's objections
3 do not provide a basis to reject the Report and Recommendation. The Report and
4 Recommendation should be adopted and the petition dismissed.

5 **DISCUSSION**

6 **A. STATUTE OF LIMITATIONS AND STATUTORY TOLLING**

7 Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), petitioners have
8 one year to file a writ of habeas corpus. 28 U.S.C. § 2241. It provides:

9 (1) A 1-year period of limitation shall apply to an application for a writ of habeas
10 corpus by a person in custody pursuant to the judgment of a State court. The
limitation period shall run from the latest of--

11 (A) the date on which the judgment became final by the conclusion of
12 direct review or the expiration of the time for seeking such review;

13 (B) the date on which the impediment to filing an application created by
14 State action in violation of the Constitution or laws of the United States is
removed, if the applicant was prevented from filing by such State action;

15 (C) the date on which the constitutional right asserted was initially
16 recognized by the Supreme Court, if the right has been newly recognized
by the Supreme Court and made retroactively applicable to cases on
collateral review; or

17 (D) the date on which the factual predicate of the claim or claims
18 presented could have been discovered through the exercise of due
diligence.

19 (2) The time during which a properly filed application for State post-conviction or
20 other collateral review with respect to the pertinent judgment or claim is pending
shall not be counted toward any period of limitation under this subsection.

21 28 U.S.C. § 2244 (d)(1)-(2).

22 As stated in the Report and Recommendation, one year after Petitioner's judgment was
23 final for purposes on § 2241 (d)(1)(A) was on November 22, 2000. He filed this petition over 16
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1 years later. Petitioner asserts in his objections that his petition is timely due to statutory tolling
2 under § 2241 (d)(1)(B) and (D). Dkt. 17.

3 1. Timeliness Under § 2241 (d)(1)(B)

4 In his objections, Petitioner repeats his assertion that it was not until April of 2015 (the
5 date that the prison in which he was held received a copy of a Washington State Supreme Court
6 case *State v. W.R., Jr.*, 181 Wn.2d 757 (2014), decided on October 30, 2014), that a State created
7 impediment was removed so that he could challenge his conviction. Dkt. 17. Petitioner explains
8 that in *W.R., Jr.*, the Washington State Supreme Court held that prior state case law (*State v.*
9 *Camera*, 113 Wash.2d 631 (1989)) impermissibly held that a defendant in a rape case must
10 establish consent which, in violation of the due process clause, impermissibly shifted the state's
11 burden to prove every element beyond a reasonable doubt to the defendant. Dkt. 17, at 5-6. He
12 asserts that he could not have successfully challenged his convictions under the prior state case
13 law; it wasn't until the State Supreme Court overruled *Camera* that his challenge could be made.
14 *Id.*

15 This objection does not provide a basis to reject the Report and Recommendation. The
16 federal habeas corpus statute, 28 U.S.C. § 2254, is the vehicle by which the petitioner could have
17 raised a federal constitutional challenge to the state case law he contends was unconstitutionally
18 applied to him. That is, Petitioner's claim (that the state courts' application of *Camera*,
19 regarding whether he had the burden to establish consent or the state had to prove that the victim
20 did not consent, was a violation of his federal constitutional rights), could have been raised
21 before November of 2000. Aside from arguing that it would not have been a successful
22 challenge, he makes no showing that the state courts' decisions in this or other cases "prevented
23 [him] from filing [a federal petition]." § 2241 (d)(1)(B); see *Shannon v. Newland*, 410 F.3d 1083,
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1 1087 (9th Cir. 2005)(state court’s decisions were not an “impediment” under § 2241 (d)(1)(B) to
2 the filing of a federal habeas petition; petition could have been filed at any time). As stated in
3 the Report and Recommendation, merely asserting that the state “misapplied” federal law is
4 insufficient to show a state action impeded him from filing a petition in federal court.

5 2. Timeliness under § 2241 (d)(1)(D)

6 Petitioner also claims that his petition is timely due to statutory tolling under § 2241
7 (d)(1)(D), “the date on which the factual predicate of the claim or claims presented could have
8 been discovered through the exercise of due diligence.” Dkt. 17, at 7-9. He maintains that it
9 wasn’t until April of 2015 that he discovered the Washington State Supreme Court’s decision in
10 *W.R., Jr.*, and that is the “factual predicate” of his current claim was discovered. *Id.* As stated in
11 the Report and Recommendation, court decisions establishing propositions of law are not
12 “factual predicates” under § 2241 (d)(1)(D). Dkt. 16, at 6 (*citing Shannon v. Newland*, 410 F.3d
13 1083, 1088-89 (9th Cir. 2005)). Petitioner makes no showing that the Washington State Supreme
14 Court’s decision in *W.R., Jr.*, was a “factual predicate.”

15 **B. EQUITABLE TOLLING**

16 The Report and Recommendation recommends finding that Petitioner is not entitled to
17 equitable tolling. Dkt. 16, at 6-7. This recommendation should be adopted. Petitioner does not
18 show that “some extraordinary circumstance stood in his way” such that equitable tolling is
19 appropriate here. Dkt. 16, at 7.

20 **C. CERTIFICATE OF APPEALABILITY**

21 The district court should grant an application for a Certificate of Appealability only if the
22 petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C.
23 § 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a *habeas*
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petitioner must make a showing that reasonable jurists could disagree with the district court's resolution of his or her constitutional claims or that jurists could agree the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483–485 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When the court denies a claim on procedural grounds, as it did here, a petitioner must show that jurists of reason “would find it debatable whether the district court was correct in its procedural ruling” and that jurists of reason “would find it debatable whether the petition states a valid claim of the denial of a constitutional right.” *Slack v. McDaniel*, at 484.

Petitioner's objections do not provide a basis to reject the Report and Recommendation's recommendation that a Certificate of Appealability be denied. Petitioner has not shown that “jurists of reason would find it debatable whether [this Court] was correct in its procedural ruling.” *Slack*, at 484. He has not demonstrated that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.” Moreover, he failed to make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253 (c)(3). Jurists of reason could not agree that the issues presented were adequate to deserve encouragement to proceed further. *Slack*, at 483–485. The Report and Recommendation should be adopted, and a Certificate of Appealability should be denied.

ORDER

It is **ORDERED** that:

- The Report and Recommendation of U.S. Magistrate Judge David W. Christel (Dkt. 16)

IS ADOPTED;

- The Petition **IS DISMISSED**; and
- The Certificate of Appealability **IS DENIED**.

1 The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge
2 David W. Christel, all counsel of record, and to any party appearing pro se at said party's last
3 known address.

4 Dated this 28th day of November, 2017.

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7 ROBERT J. BRYAN
8 United States District Judge
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